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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 396

CITY OF MORGANTOWN, WEST VIRGINIA,
A MUNICIPAL CORPORATION,
Petitioner,

vs.

ROYAL INSURANCE COMPANY, LIMITED,
Respondent

UPON PETITION OF CITY OF MORGANTOWN FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF FOR PETITIONER

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55 *Harvard Law Review* 861
Hogg's Pleading and Forms, Fourth Edition (W. Va.), page 294 4
3 *Moore's Federal Practice* (1947 Supplement), Section 39.01, page 33 6

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REPLY BRIEF FOR PETITIONER

Reply to Respondent's "Statement of the Case"

The respondent's description of the policy in this action as a "renewal" policy is misleading. It was in fact an entirely new, separate and distinct contract of insurance. Respondent says that when issued "both parties" intended it "merely as a renewal of the prior windstorm policy," thus implying this to be an established fact. However, this is a point which is put directly in issue by the answer and counterclaim of insured. The statement that the word "Windstorm" was typed on the "front" of the policy is not strictly accurate since the word "front" might be taken to refer to the face of the policy. We believe it is, strictly speaking, typed on the cover or back of the policy. It is

not part of the contract. The insured is cautioned to "See Inside of Policy for Perils Covered" (R. 17).

Respondent undertakes to explain its undue haste in bringing this action by speculating on the possibility that it might be charged with laches if it had not done so promptly. The laches with which respondent is chargeable occurred between March 22, 1947, the date the policy was issued, and the date sometime after August 20, 1947, when the fire occurred. During that time the policy was in force and was to all appearances a policy furnishing insured with fire coverage as set up in its answer (Fifth and Sixth Defenses, R. 9-11). After the fire and insurer's discovery of the alleged mistake, it could have denied liability on the ground of such mistake. This would have put the insured on notice just as effectively as institution of the action.

We do not agree that the "only issue" is mutual mistake. This is perhaps the principal issue, from the point of view of respondent, but there is also the insured's defenses of estoppel (Answer, Fifth Defense, R. 9-10) and negligence on the part of the insurer in not discovering the alleged mistake until after the fire (Answer, Sixth Defense, R. 10-11).

Questions Presented

The appealability question is so intertwined with the right to jury trial that the Court cannot pass on the one without sustaining or denying that right. Thus we assume that the Court must necessarily pass on the substance of our appeal.

Reply to Argument of Respondent

The Basic Issues

Are they legal or equitable? We have never conceived of reformation as other than a creature of equity, historically or otherwise. So far as the complaint only is con-

cerned, the "*sole*" issue is mutual mistake. If respondent stated this issue in these words we would find no point of disagreement. But respondent constantly plays on the word "reformation," which is a remedy and not the issue at all. For example, at page 11 of respondent's brief (hereinafter referred to as R.B.), in this statement—"Petitioner ignores the fact that, as a defense to an action at law, reformation and fraud are not in the same class, • • •." Of course, they are not in the same class and we have never so contended. We agree with respondent that reformation is not a defense either at common law or under "present procedural rules" (R.B. 11). It is a remedy devised by courts of equity in cases where courts of law did not afford relief. Respondent has always insisted upon confusing the issues with the remedies afforded to the complaining party, and it carried the Circuit Court of Appeals down this fallacious path. The point we have questioned is the need for invoking this relief by reformation when a defense—as mistake—is available in an action at law.

With exception of the *Philippines* case (R.B. 9) the respondent's citations are cases where reformation was prerequisite to an action on the contract and not cases where mistake is set up by way of defense. The *Philippines* case was decided under a particular statute, the Code of Civil Procedure of the Philippine Islands. No question of jury trial on any of the issues was involved and the court granted the relief sought, defense against the contract, without a suit for reformation under the code procedure.

Mistake as Defense to Action on the Policy

Respondent argues that petitioner distorts the principle of "adequate remedy at law" and that mistake as a defense is based upon "present procedural changes" (R.B. 11). We take the latter to refer to the *West Virginia Code* provision,

Chapter 56, *Article* 5, *Section* 5, and the *Federal Rules of Civil Procedure, Rule* 8(c), cited in our brief filed with the petition. These were not relied upon as the basis for the remedy but rather to show that the remedy at law is confirmed and extended by code procedure.

The West Virginia statute enlarged and extended the relief afforded by affirmative defenses. At common law the defense was not available against a sealed instrument and did not afford relief by judgment over against plaintiff in a proper case. The statute was intended to extend the remedy to sealed instruments and permit recovery over of damages. *Hogg's Pleading and Forms, Fourth Edition* (W. Va.), page 294, citing *Columbia Accident Association* v. *Rockey*, 93 Va. 678, 25 S. E. 1009, page 1010. At common law mistake was always available as a defense to an unsealed instrument (Appendix to our original brief). The Federal Rules merely confirm the right to plead affirmative defenses.

Respondent concedes that at common law mistake was available but limited to certain types of mistake, that is, those "which operated at the time of the negotiations to prevent the contracting parties from reaching any agreement at all" (R.B. 18). We do not agree that mistake at common law was thus limited. However, since this case is clearly within the types mentioned, we see no reason to discuss this point. The alleged mistake here is that the parties did not intend a fire insurance policy. The minds of the parties never met and there was no contract of fire insurance effected, if respondent's theory is accepted.

In two of the West Virginia cases cited (R.B. 17), the only relief sought was in equity by reformation. The fact that equity will reform a contract in a proper case does not prove that the defense of mistake may not be available at law where denial of recovery is the only relief sought

in the particular case. See *Hagan* v. *Candler, Inc.*, (Ga.) 189 S. E. 595.

The case of *Knowlton* v. *Campbell*, 48 W. Va. 294, 37 S. E. 581, does not sustain the point for which cited, viz., that in West Virginia mistake in a written instrument is correctible only by reformation. Respondent quotes only part of the syllabus. Elsewhere in the syllabus both mistake and fraud are excepted from the rule excluding parol evidence in law and equity, the court distinguishing only as to whether there is an ambiguity on the face of the instrument. It must be borne in mind, however, that the court there was not dealing with mistake by way of defense but in contradiction of the contract on which plaintiff sought recovery in the action.

The later West Virginia cases make no such distinction so far as fraud and mistake are concerned, both being treated as exceptions to the parol evidence rule at law and in equity.

Attorneys' National Clearing House v. *Greever*, 121 W. Va. 601, 5 S. E. (2d) 621, syllabus 2;

> "In the absence of a showing of fraud or mistake, an unambiguous written agreement must be deemed the repository of the understanding between the parties."

To the same effect see:

Central Trust Company v. *Virginia Trust Company*, 120 W. Va. 23, 197 S. E. 12, syllabus 1;

Anderson v. *Hyman*, 113 W. Va. 760, 169 S. E. 741, syllabus 1.

The Issues of Estoppel and Negligence on the Part of the Insurance Company

This Court has recognized these issues as properly triable at law. *Union Mutual Life Insurance Company* v. *Wilkinson*, 13 Wall. 222, 20 L. Ed. 617. See also *Massachusetts Bonding & Insurance Company* v. *Piedmont Service Station* (Va.), 181 S. E. 397, 400.

The Criticism of This Court's Rule in the Enelow and Ettelson Cases

The court in *Ring* v. *Spina* (C. C. A. 2) 166 F. (2d) 546 (R.B. 12), has not "viewed with considerable misgiving" the *Enelow* and kindred cases. It merely mentions the fact that Professor Moore criticized the rule, then adds "but for our purpose we must of course accept it as a gloss upon the statute, intended to promote prompt settlement in a case of the important question of form of trial" (Opinion, 548). And, further, "Since as later developed, we view the action as one of legal aspect, entitling the plaintiff to a jury trial on demand, our case is clearly within the *Ettelson* ruling and the order is appealable" (Opinion, 549).

Professor Moore couches his objection to the rule in the *Enelow* and *Ettelson* cases in these words:

> "Our criticism is predicated upon the belief that it is unsound to perpetuate a procedural anachronism which is at odds with the new federal procedure, and which flies in the face of the well-settled federal policy against interlocutory appeals, since it is only by an ingenious resort to the obsolete that the Court can bring the *Ettelson* case within the statutory authorization of an interlocutory appeal." 3 *Moore's Federal Practice* (1947 Supplement), §39.01, page 33.

As long as the right to jury trial depends upon whether the basic issue is legal and the relief afforded at law is

adequate, the court must necessarily determine in the first instance whether it is acting as a court of law or a court of equity. If it decides that it is acting as a court of law, then it would be illogical to refuse to recognize that, in the event it refuses a jury trial, it is thereby enjoining itself as a law court. If this be a "fiction" then it is a fiction which is justified by logic and by the need for preserving a litigant's constitutional rights.

But, we fail to see that the court's ruling in the *Enelow* and *Ettelson* cases is subject now to review by the Circuit Court of Appeals. Certainly this ruling is the law of the land and binding on the lower federal courts. We see no reason why we should now reexamine the court's reason for the rule.

Urgency of Respondent's Action for Reformation

Why all the undue haste in bringing an action for reformation before denial of the insured's claim and expiration of the time within which insured is barred from an action on the policy? Respondent says it could not risk delay as it might be charged with laches. We ask—would not a denial of liability have satisfied all requirements of notice? As a loss had already occurred and no other claim could possibly arise on the policy, what laches could thereafter be charged to the insurer? In the *Snell* case (R.B. 10), the question of laches arose in the case of insured and the court was determining whether he had been guilty of laches after discovery of the mistake. In the case of *American Life Insurance Company* v. *Stewart* (R.B. 10), a life insurance policy with an incontestible clause was involved. Judge Rutledge clearly differentiates this case in his opinion in *Prudential Insurance Company* v. *Saxe* (Opinion, 32).

Since the building has been destroyed, no further liability could arise under this policy, whether viewed as a fire or as

a windstorm policy. The insurer really does not want to reform the policy, but only seeks to deny liability and to try to keep the City from the jury trial to which it would be entitled if the City had sued.

Petitioner's right to a jury trial is clear, since the basic issues are legal and the remedy by defense to an action on the policy is adequate without any reformation of the policy. How then can it be said that the appeal presents "no question of substance" without annulling the prior decisions of this Court? The answer must be in the negative unless this Court intends now to depart from those decisions, a course which neither reason or policy would seem to dictate under the circumstances.

Respectfully submitted,

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